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No. 06-278

In the Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[*]

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. The Society's legal advocacy division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case is about far more than the propriety of Deborah Morse's reaction to Joseph Frederick's ill-advised stunt. Distilled to its essence, this case is about public school power versus student freedom. More specifically, it concerns the extent to which the Constitution constrains the power of government education officials to censor or punish student expression that they find objectionable. As is true for most of this Court's cases, both the reasoning and result will almost certainly have a significant impact upon disputes involving different facts and circumstances.

The *amicus* submits this brief neither because of its offense at Frederick's reference to Jesus nor because his banner somehow constituted the sort of "religious expression" this Court has traditionally protected. Instead, *amicus* intends to warn this Court how undue deference to public school power in this case would almost certainly end up undermining legitimate expressions of religion by public school students.

The *amicus* is particularly concerned by the desire expressed by the National School Boards Association, the American Association of School Administrators, and the National Association of Secondary School Principals for increased power to censor or punish student speech they believe "invades the rights of others." Religious organizations, including student religious groups, coalesce around shared religious commitments. They draw their leaders from among those who

voluntarily share those religious commitments, whether they be doctrinal or ethical. Many government officials, including many who govern public educational institutions, condemn such commonplace and benign actions as "discrimination" that injures others. The *amicus* respectfully requests that the Court, in adjudicating this case, be mindful that many school officials desire to punish such exercises of religious expressive association without meaningful constitutional limits.

The *amicus* is also concerned by the stated desire of Petitioners and some of their *amici* for wide latitude to censor or punish student expression that they deem inconsistent with their "educational mission" or with "evolving community standards" they themselves identify. Too many public education officials believe that legitimate expressions of religious belief contradict their educational missions and conflict with the "values" they hope to instill in students. Granting school officials undue power to censor or punish expression on this basis is a recipe for significant diminution of student religious freedom in our nation's public schools, something this Court has consistently protected.

Finally, the *amicus* urges this Court not to analyze the instant case under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), given the potential negative impact such an analysis might have on the freedom that student religious speakers currently possess.

ARGUMENT

I. This Court Should Not Give Public Education Officials Undue Power to Censor or Punish Student Expression on the Ground That It Allegedly "Invades the Rights of Others"

In their *amicus* brief, three associations representing the majority of this nation's public school officials ask this Court for increased power to censor or punish student speech that "offends" others, even though the Petitioners did not suspend Joseph Frederick from school on this basis. This Court should decline their invitation. Unfortunately, in the absence of meaningful constitutional restraints on their power, history tells us that many public school officials will almost certainly use this power to prevent or punish legitimate expressions of student religious belief and commitment, including the benign and commonplace practice of organizing around shared doctrines and ethical precepts.

A. The NSBA Seeks Additional Latitude to Censor or Punish Student Expression That Allegedly "Offends" Others

Invoking *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the National School Boards Association and its co-*amici* seek additional latitude to censor or punish student speech that might be perceived as "hurtful" by another student. (NSBA Brief at 21). They desire the authority to suppress "hurtful messages" even if

"the others suffer those messages in silence." (*Id.*) *See also id.* at 3, 20-22 (seeking power to regulate student expression that "intrud[es] on the rights of other students"; that might be "threatening or hurtful" to other students; that "collides with the rights of other students"; that is "insulting," "derogatory," or "disrespectful"; or that involves "palpably hurtful expressions of disrespect for others").

B. Religious Students and Student Groups Sometimes Undertake Actions That Many Public School Officials Believe "Offend" Others

Religious groups organize around shared religious commitments. In order to maintain their particular character over time, many religious groups express their shared commitments in creeds, confessions, catechisms, or statements of faith, drawing their leaders and members from those individuals who voluntarily share the commitments expressed in those documents. Other groups do not codify their doctrines in this manner but nonetheless maintain a communal understanding of orthodoxy.

By drawing their leaders and members from those who share the group's religious commitments, individuals who reject the group's commitments are necessarily ineligible for leadership or membership. However, many religious groups communicate their religious beliefs to those who do not currently share these commitments in the hope that they will embrace them and join the community. These groups therefore do not shun, reject, or belittle non-

adherents, but instead reach out and welcome them out of genuine concern for their temporal happiness and eternal destiny.

Religious individuals and groups also communicate controversial messages. At its best, religion voices prophetic critiques of injustice and unrighteousness, urging individuals and society to do better. Without question, those whose actions are the subject of such assessments are often "offended." Martin Luther King, Jr., undoubtedly offended the likes of Bull Connor. Dietrich Bonheoffer "insulted" the Nazis. British slave traders almost certainly felt that William Wilberforce had "disrespected" them. The Apostle Paul observed in his letter to the Galatians that many perceived the Gospel message as an "offense." (Galatians 5:11.) His assertion in his letter to the Romans that "all have sinned and fall short of the glory of God" certainly did not (and to this day *does* not) endear him to those confident of their own righteousness. (Romans 3:23.)[1]

C. Many Public Education Officials Believe that Such Actions "Invade the Rights" of Others

Aside from the generic "offense" that others might feel in reaction to prophetic calls for repentance from injustice and unrighteousness,

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[1] It should be noted that religious students are sometimes on the receiving end of offensive remarks. In its brief, the NSBA acknowledges this, observing that Frederick's banner "might plausibly be interpreted as mocking Christianity's central religious figure and trivializing faith traditions or sincerely held religious beliefs in general." (NSBA Brief at 21.)

many public education officials believe that religious expression can "invade the rights" of others in two main ways. First, certain religious expression is seen as violating a right to be free from discrimination. Second, some student religious speech is thought to constitute a "verbal assault" on others, thereby transgressing the rights of others to be free from such attacks.

1. Religious expressive association and third parties

Many government officials – including those involved in public education – have concluded that when religious individuals voluntarily coalesce into groups around common religious commitments, they "insult," "offend," "injure," "disrespect," are "hurtful" to, and "invade the rights" of third parties. If this Court gives public school officials broad latitude to censor and punish expression that "interferes with the rights of others," one can be sure that many principals, superintendents, and school boards will invoke this power to forbid religious students from undertaking such benign and commonplace activity.

Many public higher education officials have already punished religious student groups that draw their leaders and official members from those that voluntarily share their religious commitments, contending that they are protecting non-adherents from insult, offense, injury, disrespect, and an invasion of their rights. These officials have concluded that these religious groups' policies and practices constitute "discrimination" on the basis of

religion or sexual orientation.[2] Law school chapters of the Christian Legal Society (CLS), a 44 year-old association of Christian lawyers, judges, law professors, and law students, have endured a relentless assault by law schools intolerant of their unpopular perspective on the morality of homosexual conduct or the relevance of religious belief. Just within the last three years, public university officials have threatened, de-recognized, or denied benefits to CLS law student chapters at Ohio State University, Washburn University, Arizona State University, University of California Hastings College of Law, the University of Iowa, the University of Toledo, the University of Wisconsin, and Southern Illinois University. Other religious student groups at the University of North Carolina, Penn State University, the University of Oklahoma, the University of North Dakota, the University of Minnesota, the University of Missouri, and the University of Georgia have confronted similar problems in the recent past.

Certain of these universities, including Ohio State, Washburn, Penn State, Toledo, and

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[2] The *amicus* rejects the notion that religious student groups commit "discrimination" by taking religious belief and moral conduct into account in choosing their leadership and voting membership. Properly understood, "discrimination" is the invidious reliance upon irrelevant characteristics. Religious groups' preservation of their religious character is not invidious; religious belief and moral conduct are not irrelevant. *Cf.* 42 U.S.C. §2000e(j) (exempting religious employers from Title VII's ban on religious discrimination in employment). Furthermore, most religious groups do not focus on "sexual orientation," to the extent that phrase is defined as a person's experience of same-sex or opposite-sex sexual attraction. They instead focus on conduct (extramarital sexual activity, whether it be homosexual or heterosexual), belief, and advocacy.

Minnesota, wisely amended their non-discrimination policies to respect the religious freedom rights of religious student groups, either before or shortly after litigation ensued. *See, e.g., Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook*, S.D. Ohio No. 2:04-cv-197; *Maranatha Christian Fellowship v. Regents of the Univ. of Minn. System*, D. Minn. No. 0:03-cv-05618; *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, D. Kan. No. 5:04-cv-04120; *DiscipleMakers v. Spanier*, M.D. Pa. No. 4:04cv-02229 (Penn State University); *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, N.D. Ohio No. 3:05-cv-07126; *Beta Upsilon Chi v. Adams*, M.D. Ga. No. 3:06-cv-00104-CDL (University of Georgia). However, a number of universities have steadfastly refused to accommodate these groups' sincere religious beliefs and exercise, vigorously contesting the student groups' efforts to vindicate their constitutional rights in court. *See Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, D. Ariz. No. 2:04-cv02572 (ASU changed its non-discrimination policy to respect religious freedom on the eve of trial); *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane*, 2006 WL 997217 (N.D. Cal. No. 3:04-cv-04484 May 19, 2006), *appeal pending*, 9th Cir. No. 06-15956; *Alpha Iota Omega Christian Fraternity v. Moeser*, 2006 WL 1286186 (M.D.N.C. No. 1:04-cv-00765 May 4, 2006) (University of North Carolina); *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853 (7th Cir. 2006).

In these cases, the universities and their supporters contend that punishing a religious

group's expressive association protects the interests of third parties. In *Christian Legal Society v. Kane*, the district court permitted Hastings Outlaw, a homosexual rights advocacy organization, to intervene as a defendant in the case after concluding that it had a significant protectable interest in nondiscrimination on the basis of sexual orientation. In the brief it submitted to the Ninth Circuit on appeal, Outlaw argued that Hastings College of Law should be permitted to de-recognize the CLS chapter so that "lesbian, gay, and bisexual students [could] attend law school in an environment free from discrimination and ... have an equal opportunity to become members of any registered student organization without regard to their sexual orientation [or] religion." (Brief of Hastings Outlaw at 1-2). *See also id.* at 5 (Hastings needs to punish the CLS chapter "to protect its students from the harmful impact of invidious discrimination"); *id.* at 6 (Hastings needs to derecognize the CLS chapter "in order to address the harmful, non-expressive consequences" of the chapter's practices).

This phenomenon – school officials punishing religious associational freedom to protect third parties from "discrimination" – is not limited to the higher education context. In *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996), a public high school argued that it needed to withhold recognition of a student religious group that drew its leaders from among those sharing its religious beliefs in order to protect non-adherents from "animus." The school district asserted that the club's means of preserving its religious identity "would disadvantage, subordinate, or stigmatize the

excluded students." *Id.* at 871. The school district further contended that the club's policy "creates multiple 'classes' of students, balkanizes the student community and breeds contempt, distrust and dissen[s]ion." *Id.* It therefore argued that *Tinker* permitted it to withhold valuable benefits from the club. In its supportive amicus brief, the New York State School Boards Association argued that the school district needed to punish the club so that it would not "trample upon the constitutional rights of others." 1995 WL 17203499 at *12.

2. Student religious speech and the right to be free from "verbal assaults"

The Ninth Circuit's opinion in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), illustrates the desire of many public school officials to punish controversial religious speech in the name of protecting third parties who might be offended thereby – as well as the willingness of some federal judges to find this constitutionally permissible.

In this case, school officials ordered a high school student to remove a t-shirt that said "homosexuality is shameful," a paraphrase of verse 27 of chapter 1 of Paul's letter to the church at Rome, a text (like all books in the Christian canon of Scripture) considered by many Christians to be inspired by God.[3] The student filed suit, alleging a violation of his First Amendment rights. In denying his request for a

[3] "Likewise also the men, leaving the natural use of the woman, burned in their lust for one another, men with men committing what is shameful." Romans 1:27.

preliminary injunction, a divided panel of the Ninth Circuit held that the student was not likely to succeed on the merits of his claim. *Harper*, 445 F.3d at 1175-1192. The panel majority concluded that *Tinker* permitted school officials to prohibit him from wearing a t-shirt bearing a paraphrase of a Bible verse because that verse "intrude[d] upon ... the rights of other students." *Id.* at 1175. The panel majority's willingness to conflate a student's paraphrase of a Bible verse with persistent, personally-directed harassment and even violence, *id.* at 1178-1183, is a particularly worrisome aspect of its opinion.

In their *amicus* brief, the NSBA and its co-*amici* identify *Harper v. Poway* as a correct application of *Tinker*'s statement that public schools may restrict student expression to protect the rights of others. (NSBA Brief at 2 n.2, 21-22). They thus reveal the scope of the power they seek from this Court.

D. This Court Should Not Give Government Officials Power to Censor or Punish Student Expression Simply Because It Offends Others

In this case, the Petitioners and their *amici* urge this Court to grant them the power to censor and punish expression that invades the rights of others. In their eyes, the category of expression that invades the rights of others is extremely broad. Religious individuals and groups often express themselves in ways that others might find offensive. Public school officials are very much inclined to censor and punish

religious expression to prevent invasion of the rights of others.

This Court should not give them that power, particularly when it threatens religious liberty, Americans' first freedom. The Court has consistently protected religious speakers from overzealous public education officials. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 389 (1993); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001). The *amicus* respectfully encourages the Court to remain true to this admirable track record by adjudicating this case in a manner that does not give school officials undue power – power they will almost certainly use to censor and punish religious expression, both speech and association.

Tinker itself provides a basis for rejecting the request for essentially unchecked authority to regulate student speech on the ground that it offends others. The *Tinker* Court declared that school officials may not prohibit speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. Under *Tinker*, First Amendment freedoms should not be subordinated to a desire to prevent someone from experiencing "discomfort" or "unpleasantness," even where school officials

hyperbolically characterize assertive religious speech as "verbal assault."

This Court should be particularly willing to protect student expression on issues about which the country is deeply and seriously divided. Thankfully, very few parents want their children to take illegal drugs. Yet a large percentage of American parents want their children to believe and follow the teachings of scriptures they believe are divinely inspired, including teachings about the morality of extramarital sexual intimacy. To be sure, many parents, students, school boards, superintendents, and principals reject these teachings; indeed, the percentage of the population that disagrees with such views may well be growing. Yet this is precisely why the counter-majoritarian First Amendment must not be weakened.

Finally, a legal rule turning on the "offensiveness" of speech in the eyes of another is deeply problematic. It is virtually impossible to apply such a vague and potentially limitless standard in an even-handed manner. Inevitably, school officials will end up either punishing only speech that offend *them* or censoring far too much expression in an effort to prevent any potential offense that might possibly occur.

II. This Court Should Not Give Public Education Officials Undue Power to Censor or Punish Student Expression on the Ground That It Contradicts Their Educational Mission

The Petitioners and their supportive *amici* urge this Court to loosen the constitutional restraints on their power to censor or punish student expression on the ground that it contradicts a school system's educational mission. Invoking *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), they desire substantial deference to their articulation of their educational mission and to their identification of student expression that undermines it.

A. Many Public Education Officials Believe That Student Religious Expression Undermines Their Educational Mission

It is eminently reasonable to fear that public school officials, if given the expansion of power they seek, will use that power to censor or punish religious expression. First, public education officials have consistently argued that religion and religious expression in general conflict with their core educational mission. Second, public education officials have repeatedly argued that certain exercises of the right of associational freedom contradict the values they hope to instill in students. Third, many public education officials believe that religious speech on controversial moral issues is socially inappropriate or uncivil.

1. Public Education Officials Have Often Asserted That Religion and Student Religious Expression in General Do Not Belong in Public Schools

Many of the disputes between student speakers and public school officials over the years have involved religion. Most often, public schools invoked the Establishment Clause to defend their discrimination against student religious speakers. However, they often revealed in these lawsuits their more foundational objection to religion in the schools.

For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 389 (1993), the National School Boards Association, an *amicus* in the instant case, encouraged this Court to reject a religious group's claim that a public school district violated their First Amendment rights by denying it after-hours equal access to meeting space in a school building. Among other things, the NSBA urged this Court to defer to school boards' understanding of their "educational mission," including "the preparation of students for citizenship in a democratic society" for which purpose "public school officials and the school community must conduct themselves in a manner which engenders among schoolchildren tolerance, understanding, and a sense of community." With an ironically deficient definition of "tolerance, understanding, and a sense of community," the NSBA and its fellow *amici* then argued that access for a religious community group would "detract from the achievement of this aspiration."

In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the NSBA again filed an *amicus* brief in support of school officials' exclusion of the religious community group. The NSBA claimed that the school district had the authority to limit its after-school uses to "only those activities consistent with its mission," a mission the district's exclusion of the religious community group furthered because of the "impressionability of students and the inappropriate subject matter on school grounds." *See also Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir. 1990) (school district denied religious group equal access under "policy [that] purport[ed] to limit access to those organizations, groups, and activities which are compatible with the mission and function of the school system").

2. Some Public Education Officials Believe That Exercises of Religious Associational Freedom Contradict Their Educational Mission

In multiple contexts, public education officials have revealed their view that exercises of religious associational freedom contradict their educational mission.

As discussed above, numerous government institutions of higher education have denied valuable benefits to religious groups that have exercised their right of religious associational freedom by coalescing around shared religious beliefs and ethical precepts. Schools like Southern Illinois University, the University of Wisconsin, and

Hastings College of Law have de-recognized religious student groups not only to prevent other students from suffering offense, but also because such exercises of religious associational freedom are deemed to contradict the schools' educational mission.

In their challenge to the Solomon Amendment, numerous law schools revealed how they view their "educational mission" and how they identify the "civic values" they hope to instill in their students. *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S. Ct. 1297 (2006). They challenged the Solomon Amendment on the ground that compliance therewith interfered with their effort to inculcate students with their chosen perspective on a controversial political and moral question by excluding others holding a contrary view. The association, which included a number of public law schools, contended that facilitating the recruitment efforts of the military – an employer that takes same-sex sexual conduct into account – undermined the ability of its members to communicate their disapproval of such employment practices to their students.

Although *Rumsfeld* concededly involved institutions of higher education dealing with the military rather than K-12 public schools dealing with their students, the law schools' understanding of their educational mission matches the view many K-12 officials have of their own objectives. To illustrate, the school district in *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996), argued that allowing a student Bible club to draw its

leaders from those who professed faith in Christ would materially interfere with its educational mission. *Id.* at 870-82.

B. This Court Should Not Give Public School Officials Undue Power to Restrict Religious Expression on the Ground that It Undermines a School's Educational Mission

The *amicus* respectfully requests that this Court not confer undue power upon school districts to restrict religious expression on the ground that it undermines a school's educational mission.

It is not hard to imagine how public educational institutions might use their expanded power to limit dissent, and to do so in the name of "inculcating values" in their students. Revisiting historical controversies suggests all too plainly how excessive power would be employed if recognized by this Court.

In 1969, at the height of the controversy over American military involvement in Vietnam, students at Central Connecticut State College, a public institution, formed a local chapter of Students for a Democratic Society (SDS). *See Healy v. James*, 408 U.S. 169, 172 (1972). The president of the state college denied their request for official recognition as a campus organization in part on the ground that the group's "philosophy was antithetical to the school's policies." *Id.* at 175. The president declared that access to student group benefits "should not be granted to any group that 'openly repudiates' the

College's dedication to academic freedom." *Id.* at 175-76. This Court rightly held that the college's decision violated the students' First Amendment rights. *Id.* at 194. *See also Hudson v. Harris*, 478 F.2d 244 (10th Cir. 1973) (anti-war group denied recognition by state college stated First Amendment claim for relief).

During the same time frame, a number of public universities attempted to stifle fledgling student chapters of the American Civil Liberties Union. In the fall of 1969, a group of students at state-run Radford College in Virginia sought recognition of a campus ACLU chapter. *ACLU v. Radford Coll.*, 315 F. Supp. 893, 894 (W.D. Va. 1970). The college required that the "purpose and practices" of student groups be consistent with "the broad educational philosophy of Radford College." *Id.* at 894. In refusing to recognize the ACLU chapter, the faculty declared that the "role and purpose of the American Civil Liberty [sic] Union lies basically outside the scope and objectives of this tax supported educational institution." *Id.* at 898. The court held that Radford, as a state college, had violated the students' First Amendment rights. *Id.* at 899.

If Radford College possessed unchecked power to inculcate its students in its "broad educational philosophy" and its "scope and objectives" by excluding contradictory voices such as, in the eyes of Radford's 1969 faculty, the ACLU, it would have been able to suppress the formation of an ACLU chapter at the college. Similarly, if this Court did not interpret the Constitution to constrain Central

Connecticut State College, its students' freedom of expression would have been trampled.

Along the same line, if this Court, in adjudicating this case, confers broad power on public school officials to censor and punish expression that contradicts their educational missions, public schools will inevitably exercise that authority, at great cost to the freedom of students. The case reports amply illustrate how poorly public school systems have treated religious speakers. To confer additional power on education officials over student speech will inevitably undermine the freedom of religious speakers, something this Court has thankfully seen fit to protect, over and over again. It would indeed be unfortunate if this Court's adjudication of the instant case would undercut its repeated vindications of religious freedom in the public school setting.

III. This Court Should Not Expand the Scope of *Kuhlmeier*

In their brief, the Petitioners suggest that this Court analyze their actions under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which permits a school district to censor speech pursuant to "legitimate pedagogical concerns" if that speech reasonably might be perceived to bear the school's imprimatur. (Pet. Brief at 32-34.) This, of course, gives school officials even more power to regulate speech than do *Tinker* and *Fraser*. The *amicus* urges this Court to reject the rather dramatic expansion of *Kuhlmeier*'s reach proposed by Petitioners.

Petitioners' *Kuhlmeier* argument turns upon its speculation that if they had failed to punish Frederick, third parties might infer school endorsement of the message on his banner. They concede that "reasonable observers might have concluded that the banner's message was so inimical to the school's mission that it did not bear the school's imprimatur," but nonetheless imply that *Kuhlmeier*'s analysis should apply. (Pet. Brief at 33.)[4]

Given the circumstances of Frederick's display, the Petitioners' suggestion that *Kuhlmeier* applies is hard to square with this Court's consistent view that public schools do not endorse everything they permit. *See, e.g., Board of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226, 250 (1990) (observing the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original).

This axiom – that school toleration of student speech does not constitute school endorsement – is fundamental to the constitutional protection of student religious speech. To illustrate, U.S. Department of Education guidelines have for a dozen years advised public school districts to heed this Court's critical distinction between government speech endorsing religion and students' religious expression. In 1995, the Department of Education

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[4] As the Petitioners correctly note, the district court in this case did not even entertain the possibility that *Kuhlmeier* might apply. (Pet. Brief at 33 n.13.)

sent a guidance letter to all the Nation's public school superintendents entitled *Religious Expression in Public Schools*, which was reissued in 1998 and 1999.[5] These guidelines emphasized the difference between the school's speech and students' private religious expression.

In addition, on February 7, 2003, the Department of Education issued guidelines, approved by the Department of Justice, entitled "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools."[6] The DOE guidelines rest on the premise that the *Mergens* "line between— government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment's scope," which "establishes certain limits on the conduct of public school officials as it relates to religious activity, including prayer." DOE Guidance, "Overview of Governing Constitutional Principles," ¶ 1, 3. The guidelines state: "Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience." *Id.* at ¶ 6 (*citing Mergens,* 496 U.S. at 248-50). The guidelines affirm that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Id.* (*quoting Mergens,* 496 U.S. at 250).

The *amicus* is concerned that if this Court relies upon *Kuhlmeier* to reverse the Ninth Circuit's

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[5] Letter from Sec'y Richard Riley to American Educator May 30, 1998, http://www.ed.gov/Speeches/08-1995/religion.html (last visited February 14, 2007).

[6] *See* www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited February 14, 2007).

judgment, that analysis might be erroneously interpreted by some to undermine the Constitution's strong protection of religious speech that takes place in school settings. The *amicus* accordingly urges this Court to agree with the lower courts in this case that *Kuhlmeier* is inapplicable.

CONCLUSION

For the foregoing reasons, the *amicus* respectfully request that the Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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